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In The

Supreme Court of the United States

October Term, 1970

No. ~~1668~~ 8

AMERICAN BEEF PACKERS, INC.,
PETITIONER,

V.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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AMERICAN BEEF PACKERS, INC.,
PETITIONER,

V.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The American Beef Packers, Inc. prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit, entered in Case No. 161-70 on February 8, 1971. Pursuant to an order by the Circuit Court, the Mandate in Case No. 161-70 has been stayed to and including April 30, 1971 to allow the Company to file a Petition for a Writ of Certiorari in this case.

Opinions Below

The decision of the National Labor Relations Board in this case is reported at 176 N.L.R.B. No. 42 (1969)

and is set out in Appendix B to this petition at page 20. The Decision of the Circuit Court enforcing this order is not yet officially reported but it is set out in Appendix A to this petition at page 16.

JURISDICTION

Jurisdiction to review by Writ of Certiorari the judgment and decision of the United States Court of Appeals for the Tenth Circuit, entered on February 8, 1971, is invoked under the provisions of 28 U.S.C. § 1254(1) (1966).

QUESTIONS PRESENTED

1. Whether or not the United States Court of Appeals for the Tenth Circuit has departed from judicial standards established by this court.

2. Whether or not the United States Court of Appeals for the Tenth Circuit denied Petitioner due process by enforcing the National Labor Relations Board's order in which material evidence was disallowed admittance.

STATUTES INVOLVED

The relevant provision of the National Labor Relations Act involved in the instant case reads as follows:

Section 8

(a) It shall be an unfair labor practice for an employer . . . (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay; *See* 29 U.S.C. (a) (1965)

CONSTITUTIONAL PROVISIONS INVOLVED

The article in addition to, and amendment of the Constitution of the United States of America involved in the instant case reads, in pertinent part, as follows:

Article V

> No person shall be . . . deprived of life, liberty or property, without due process of law . . . *See* U.S. Const. amend. V.

STATEMENT OF THE CASE

American Beef Packers, Inc. (hereinafter referred to as Petitioner or Company) is engaged in the business of the slaughter, processing and sale of meat and meat products. The Petitioner maintains plants in Oakland, Iowa, Omaha, Nebraska, and Ft. Morgan, Colorado (A-164).[1] The Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 641, AFL-CIO (hereinafter referred to as the Amalgamated Meat Cutters), the International Union of Operating Engineers, Local No. 1, AFL-CIO (hereinafter referred to as the Opertaing Engineers), and the A. L. Morgan Union, Local No. 3 (hereinafter referred to as the Morgan Union) are all labor organizations within the meaning of Section 2(5) of the Act (A.164). The Morgan Union represents the Petitioner's employees at both the Oakland, Iowa and Omaha, Nebraska, plants (A.167).

On Monday, June 10, 1968, the Petitioner commenced slaughtering operations at the Ft. Morgan, Colorado plant (A.165). On Wednesday, June 12, 1968 the Petitioner recognized the Morgan Union as the collective bargaining agent of its employees at the Ft. Morgan Colorado plant upon being presented with a request for recognition from the Morgan Union which was support-

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[1] References designated "A" refer to the printed Appendix before The United State Court of Appeals for the Tenth Circuit in Case No. 161-70.

ed by signed authorization cards from a majority of the Petitioner's employees in Ft. Morgan, Colorado (A.167, 164-165). A contract was negotiated on June 12th with the Morgan Union using the contracts at the Oakland, Iowa, and Omaha, Nebraska, plants as a guide (A.167).

On June 28, 1968, the Morgan Union sent a letter to the Petitioner protesting the manner in which the contract was being administered and on July 10, 1968 the Morgan Union held a meeting at the Farmers Union Hall in Ft. Morgan, Colorado, to discuss employee grievances about the administration of the contract (A.167-68). On July 11, 1968, a list of grievances were presented to Company officials (A.168).

On July 3, 1968, the Amalgamated Meat Cutters filed a petition with the National Labor Relations Board (hereinafter referred to as the Board) seeking to represent all production and maintenance employees at the Company's Ft. Morgan, Colorado, plant.[2] Thereafter, on July 8, 1968, the Operating Engineers filed a petition with the Board seeking to represent all maintenance, mechanics, and engineers at the Company's Ft. Morgan, Colorado, plant.[3] The unfair labor practice charges which are the basis of the instant case were filed by the Amalgamated Meat Cutters on July 9, 1968 and by the Operating Engineers on July 10, 1968.[4]

A hearing was held on October 29, 1968, before the Trial Examiner George H. O'Brien and a decision was issued by the Trial Examiner on January 22, 1969 holding that the Petitioner had violated Section 8(a) (2) of the Labor Management Relations Act, as amended, (hereinafter referred to as the Act) by recognizing the Morgan Union on June 12, 1968 (A.162-202). On

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2 Case No. 27-RC-3457.
3 Case No. 27-RC-3460.
4 Case No. 27-CA-2534 and 27-CA-2534-2.

June 3, 1969 the Board affirmed this decision and sought enforcement of its order by petitioning the U.S. Court of Appeals for the Tenth Circuit.

After being closed down for remodeling during a portion of 1969, the Company's plant in Ft. Morgan, Colorado, reopened in September, 1969. At this time the Amalgamated Meat Cutters sought recognition from the company as the collective bargaining agent for the Ft. Morgan employees and claimed to have a majority of signed authorization cards. Agreement was reached on a contract, but the contract was never enforced because the Amalgamated Meat Cutters did not produce the authorization cards they claimed to have. On December 8, 1969, the Amalgamated Meat Cutters filed a petition with the Board seeking to represent all production and maintenance employeees at the Company's Ft. Morgan, Colorado, plant.[5] This petition was withdrawn and a similar petition was filed on December 19, 1969, by the Amalgamated Meat Cutters.[6] On December 23, 1969, the Operating Engineers filed a petition with the Board seeking to represent all maintenance mechanics and engineers at the Company's Ft. Morgan, Colorado plant.[7]

On January 2, 1970 the Morgan Union filed unfair labor practice charges against both the Amalgamated Meat Cutters[8] and the Company[9] alleging that the Company had improperly recognized the Amalgamated Meat Cutters at a time when they did not represent a majority of the Company employees. The representation petitions filed by the Amalgamated Meat Cutters and the Operating Engineers were blocked by the unfair

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5 Case No. 27-RC-3756.
6 Case No. 27-RC-3764.
7 Case No. 27-RC-3765.
8 Case No. 27-CB-551.
9 Case No. 27-CA-2861.

labor practice charge and a hearing was held on the unfair labor practice charge on May 21, 1970. That case is currently pending before Trial Examiner James T. Barker. In a decision dated February 8, 1971, the Circuit Court enforced the order of the Board.

REASONS FOR GRANTING THE WRIT

The Decision of the Trial Examiner and the National Labor Relations Board Departed Substantially From Accepted Judicial Procedure; and the Circuit Court, in Enforcing the Order Sought by the Board, Departed From the Standards Established by this Court in UNIVERSAL CAMERA CORP. v. N.L.R.B. 340 U.S. 474 (1951).

This Court in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951) outlines the responsibilities that appellate courts must follow in order to insure just review of Board decisions. This Court pointed out in that case that: "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses . . ."

Petitioner maintains that a review of the record indicates strongly that the evidence, on which the Board Order is established is not based on a "fair estimate of the worth of the testimony of witnesses." Therefore, the Appellate Court, in allowing this order to stand, contravened this Court's purpose of having Appellate Courts oversee Board decisions as enunciated in the *Universal Camera decision.*

The conclusion on the part of the Trial Examiner is not only not supported by substantial evidence on the record as a whole but it is also formulated from procedures that contravene the purposes of the Admin-

istrative Procedure Act and this court's decision in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951).

This Court in the *Universal Camera Corp.* case in determining the effects of the Administrative Procedure Act upon labor cases stated that: "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past . . ."

In situations like the one presented here where several issues turn on the credibility accorded various testimony, the review by the Circuit Court of the Trial Examiner's findings reaches its "highest significance." *N.L.R.B. v. A-1 Excelsior Van and Storage Co.*, 403 F.2d 959, 960 (1968).

It is the Petitioner's contention that the Circuit Court did not heed the directives of this court by summarily dismissing Petitioner's contention that the Trial Examiner's conclusions were not substantiated by adequate evidence.

The main issue in this case is whether or not a statement was made on a certain date to a certain employee to the effect that the company wanted the Morgan Union in its Fort Morgan plant. The Trial Examiner resolved this problem by accepting the testimony of one employee and neglecting the testimony of three others. The record reveals the following facts.

The Trial Examiner's conclusion is at variance with his credibility resolutions. For example, the Trial Examiner credited the testimony of the Petitioner's manager of operations, Mr. Thomas Sparks "in full." (A.188). Mr. Sparks, who had only one meeting

with employee Kroshus, as acknowledged by the Trial Examiner (A. 188), testified that the meeting with Kroshus took place after the July 10, 1968 meeting of the Morgan Union at the Farmers Union Hall in Fort Morgan, Colorado (A.121), and that plant manager Stefanich did not say anything about the Company wanting the Morgan Union in its Colorado plant (A.122).

Employee Johnson, whose testimony was also credited by the Trial Examiner, was confused about the date of the meeting (A.60), but his description does not anywhere indicate that plant manager Stefanich said anything about the Company wanting the Morgan Union in its Colorado plant (A.43-45). Stefanich also placed the time of the meeting at being after July 10, 1968 (A.141), and he also denied saying anything at the meeting that would indicate a Company preference for the Morgan Union (A.143).

Although the Trial Examiner stated that he credited Spark's testimony in full and also credited Johnson's testimony which corroborated Spark's testimony, he went on to conclude that the meeting took place prior to July 10, 1968, and that Kroshus was told at the meeting that the Company would like the Morgan Union in Fort Morgan, Colorado. The Trial Examiner based his conclusion on the following story related by Kroshus:

> According to Kroshus, he was called up to plant manager John Stefanich's office during working hours on Tuesday, June 11, 1968 and told by Stefanich in the presence of Sparks and Larry Johnson that the company would like the Morgan Union in Fort Morgan, Colorado and that he promptly went out and signed up people in the plant by telling them that the company wanted them to sign Morgan Union cards.

The testimony of Kroshus stands alone in serving as a basis for the Trial Examiner's conclusion that the Respondent illegally coerced the employees to support the Morgan Union. For these reasons, the Trial Examiner concluded that the petitioner illegally rendered coercive support to the Morgan Union in violation of § 8(a) (2) of National Labor Relations Act, as amended, and that the authorization cards used as a basis for the recognition accorded on June 12, 1968, were invalid as an indication of employee sentiment. (A.192).

The testimony given by Kroshus that is critical to the decision in this case related only to the one meeting with company officials at which Union Steward Johnson asked him to help sign people up for the Morgan Union. According to Kroshus, this conversation took place in plant manager Stefanich's office on the day following the commencement of "the kill" at the Fort Morgan plant (A.64). By any type of estimate, the testimony of Kroshus reveals that it is at least inherently probable that he fabricated the alleged conversation in plant manager Stefanich's office and "remembered things a little differently" in relation to his solicitation of Morgan Union cards than he had at the time he gave the statement to the Board agent investigating this case due to his animosity toward the Company and the Morgan Union. This animosity of Kroshus is clearly evidenced in the record (A.68-69). In light of this clearly evidenced negative attitude toward both the Company and the Morgan Union on the part of Kroshus, the Petitioner submits that Kroshus' bias should have been recognized by the Court of Appeals and that Court should have held that any finding of fact based on this testimony should have been credited only where corroborated by other reliable witnesses. In that the Appellate Court allowed this type of tes-

timony to stand it did so in contravention of the responsibliities given to it by this Court in the *Universal Camera* case.

This court pointed out in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 490, 496 (1951), that the Appellate Court should review the record evidence in the instant case in order to determine the "fair estimate of the worth of the testimony of witnesses" and that the Trial Examiner's findings should be judged in the light of the "consistency in inherent probability of testimony."

The problem with the Trial Examiner's findings is pointed out by the fact that he credited the testimony of Sparks "in full" as well as that of Johnson and the testimony of these two witnesses amply indicates that the meeting with Kroshus took place after July 10, 1968, and that no mention was made of any alleged company preference for the Morgan Union. He then goes on to make a finding that is directly opposite to his own credibility resolutions and his own findings.

Even the Board does not accept such curious decision making and has decided that a Trial Examiner's conclusion should be reversed when they conflict with his credibility resolutions. *See Teamsters, Chauffeurs and Helpers Union, Local* 279, 140 N.L.R.B. 164, 165-166 (1962). The conclusion and results of the Trial Examiner's inconsistent findings indicates obvious prejudice. If the meeting took place on June 10 and 11, the Petitioner could be arguably guilty of coercively forcing its employees to support the Morgan Union, whereas if the meeting took place after July 10, and well after the union had already obtained a majority status, the Respondent is not in violation of the act. *See Chicago Rawhide Manufacturing Co.* v. *N.L.R.B.*

221 F.2d 165 (7th Cir. 1955); *N.L.R.B.* v. *Valentine Sugars, Inc.*, 211 F.2d 317 (5th Cir. 1954); *N.L.R.B.* v. *Newman Green, Inc.*, 401 F.2d 1 (7th Cir. 1968).

The Board's failure to discount the Trial Examiner's findings, based on unsubstantial evidence, placed this responsibility on the Circuit Court. This is the general rule outlined in *Universal Camera* and enunciated in *N.L.R.B.* v. *Century Broadcasting Corp.*, 419 F.2d 711 (1969). The Court in that case states:

> The [National Labor Relations] Board's power to draw inferences is not beyond all judicial control, and upon the Court is cast the responsibility of determining whether Board findings of fact, based on inferences or otherwise, is supported by substantial evidence, when reviewed on the record as a whole. Id. at 779.

Professor Davis has stated that the evidentiary standards employed by the Board and its Trial Examiners are "unascertainable," *See* 2 Davis, *Administrative Law* § 1407 (1958), and the present situation is a fine example of that being the case.

The brief decision of the Court of Appeals indicates that there was no merit in the Petitioner's contention against the Trial Examiner's evaluation of the various witnesses' testimony or against the fairness of his hearing rulings. The court made no elaborations as to why they found no merit in the Petitioner's contentions.

The *Universal Camera* case indicates the great responsibility placed on the courts to assure that the Board keeps within reasonable grounds. It is the belief of the Petitioner that this responsibility is not fulfilled when the Appellate Court resolves the Petitioner's contentions that inconsistencies existed in the

Trial Examiner's report by simply stating in one sentence that there is no merit to these contentions. It is felt by the Petitioner that in order to adhere to its responsibilities, the Appellate Court must discredit these contentions on a point-by-point basis so that the opinion might indicate that the Court was not abdicating conventional judicial function.

II

The Company Has Been Denied Due Process Of Law By the Trial Examiner's Improper Failure to Admit Relevant Evidence and by the Appellate Court's Failure to Overturn this Improper Nonadmittance.

In the present case the Trial Examiner refused to admit relevant evidence relating to plant manager John Stefanich's animosity toward, and dislike of, the Morgan Union. The important factors involved in which this nonallowance or allowance of evidence would be effective are the allegations that the company favored the Morgan Union and wanted the Morgan Union in its Colorado plant and that this was brought out by Mr. Stefanich. In an effort to disprove this complaint allegation, the Petitioner attempted to show that Stefanich, a long time union member (A.128-129), was personally opposed to the Morgan Union and would not have made such a statement. However, the general counsel objected to this line of inquiry and the Trial Examiner did not allow the admission of this evidence (A.144). The Petitioner contends that this evidence was very relevant and that the failure of the Trial Examiner to allow its admission constitutes prejudicial error. Initially, it must be emphasized that the Board and reviewing courts are under duty to examine and compare conflicting evidence in determining whether

or not there has been a violation of the Act. *See Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487-88 (1951); *accord, N.L.R.B.* v. *Redtop Cab and Baggage Co.*, 383 F.2d 547, 554 (5th Cir. 1967). In attempting to ascertain the truth or falsity of unfair practice charges such as those at issue in this case, the Board has often considered "total patent of employee activity" to find a company in violation of the Act. *See Detroit Edison Co.*, 74 N.L.R.B. 267 (1947). The courts have agreed with the Board that evidence tending to show an employer's attitude toward unions in general or a given union in particular is an important consideration and is relevant to the ultimate determination of the case. *See example N.L.R.B. v. Link Belt Co.*, 311 U.S. 584, 588 (1941). The rationale for this inquiry is contained in the belief that an employer's attitude toward unions in general or toward a given union in particular, is evidence which tends to show a "course of conduct" and that a comparison of the events alleged with this "course of conduct" is relevant consideration in determining whether or not the Act has been violated. *See Southern Towers, Inc.* v. *N.L.R.B.* 401 F.2d 629, 632 (5th Cir. 1968); *N.L.R.B.* v. *Carpenters District Council*, 383 F.2d 89, 95 (8th Cir. 1967).

For these reasons, evidence tending to show a "course of conduct" during the time of the alleged violations has long been held to be properly admissible. *See example Valley Mold and Iron Corp.* v. *N.L.R.B.*, 116 F.2d 760 (7th Cir. 1940), *cert. denied*, 313 U.S. 590 (1941). Thus, the inquiry into the attitude of plant manager Stefanich's attitude toward the Morgan Union since his initial employment with the Company in Oakland, Iowa, was properly admissible and the Trial Examiner improperly denied its admission.

It is the position of the Petitioner that the introduction of such evidence would have lent "consistency an inherent probability" to the testimony introduced by the Petitioner to contradict the allegations in the complaint and the testimony adduced by the General Counsel, and that the Trial Examiner's refusal to admit such evidence constitutes a denial of due process as well as prejudicial error. *See Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 496 (1951); *N.L.R.B.* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9, 20 (1943); *Valley Forge Flag Co.*, v. *N.L.R.B.* 364 F.2d 310 311 (3rd Cir. 1966); *N.L.R.B.* v. *Tennessee-Carolina Transportation, Inc.*, 226 F.2d 743, 744 (6th Cir. 1955); *N.L.R.B.* v. *Burns* 207 F.2d 434, 436 (8th Cir. 1941); *N.L.R.B.* v. *Ohio Calcium Co.*, 133 F.2d 721, 727 (6th Cir. 1943). The Petitioner contends that the above reasons were enough for the Appellate Court to deny enforcement of the Board's order and that the Trial Examiner's decision in the instant case is just another example of a situation where the Board has applied "double standards" and has given no consideration to the "totality of circumstances" in this case. *See Staff of Senate Commission on the Judiciary*, 91st Cong. 1st Sess. *Subcomm. Report on Separation of Powers* 8, 9 (Comm. Print 1970).

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,
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Petitioner

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January Term, 1971

No. 161-70

NATIONAL LABOR RELATIONS BOARD,
Petitioner

V.

AMERICAN BEEF PACKERS, INC.,
Respondent.

Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO, Local Union No. 641,
Intervenor,

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before LEWIS, Chief Judge, JOHNSEN, Senior Circuit Judge, and HOLLOWAY, Circuit Judge.

PER CURIAM.

The application of the National Labor Relations Board for enforcement of its order, 176 NLRB No. 42,

issued against American Beeef Packers, Inc., respondent here, is granted.

Our reading of the transcript of the hearing before the Trial Examiner satisfies us that there is substantial evidence on the record as a whole to support the Board's findings and its determination that respondent had violated Section 8(a) (1) and (2) of the Act, 29 U.S.C. § 158(a) (1) and (2). Also we find no merit in respondent's contentions against the Trial Examiner's evaluation of the various witnesses' testimony or against the fairness of his hearing rulings.

In substance, the violations involved consisted in respondent's having accorded recognition to A.L. Morgan Union, Local No. 3, as the statutory bargaining representative of the employee at its Fort Morgan, Colorado slaughtering and processing plant, and in having entered into and put into effect a collective bargaining agreement with Morgan Union as to the employees—when the interest which respondent had made known in respect to having that representation exist in the plant and the part which it had played as to the effecting thereof in getting employees to sign a Morgan Union membership card, were such as to constitute general improper interference in choice or non-choice and so to leave respondent without right to treat or to regard the cards as evidence that Morgan Union represented an uncoerced majority of the employees.

The solicitations, the recognition made by respondent, and the execution of the contract by it had all occurred within a period of three days from the opening of the plant for slaughtering operations. The details of the situation are fully set out in the Trial Examiner's recommended decision and the Board's decision, and we see no need to repeat them here. We

shall confine ourselves merely to a brief comment on some of the challenges made by respondent to the Board's remedial order.

1. The solicited membership cards had contained a provision for dues check-off and withholding in favor of Morgan Union, and the Board ordered respondent to reimburse the employees for the withholdings so made. On the part played by respondent in getting the membership cards signed, and in the relationship to the signing of the cards of the provision therein for purported consent to such a dues check-off, we think the Board cannot be held to have acted punitively or arbitrarily, but that it had the right to regard such reimbursement as constituting a reasonable and appropriate remedial requirement in the circumstances of the particular situation. (Incidentally, it appears from the Board's brief that much, if not most, of the dues withheld has been the subject of escrow deposit.

2. We are unable to see anything improper in the proviso to the Board's requirement that respondent cease giving effect to the agreement made with Morgan Union, that "nothing in this Decision shall be construed to require Respondent to vary or abandon any wages hours, seniority, or other substantive features of its relations with its employees which Respondent has established in the performance of said contract, or to prejudice the assertion by employees of any rights they may have thereunder". This proviso does not purport to establish any rights between respondent and its employees from the illegally made collective bargaining agreement. It merely undertakes to make clear that if any legal rights or obligations may have come to exist out of what had been done under the contract, the Board's order cannot be regarded as intending to affect them. Thus, as an example, the

employer would not be able to believe, or to say to the employees, that the Board's holding that the contract had been illegally entered into, and its requirement that the employer cease to recognize the contract, would make it unlawful for him to continue to pay the wages which the employees had been receiving under the contract, and that it would therefore be necessary for him to cut the wages back to what they had been at the time the agreement was made.

3. Respondent further argues that the Board's direction that it withdraw recognition from the Morgan Union and post notice thereof should not be required to be enforced, but should be regarded as having become moot, since respondent had already made withdrawal of such recognition at the time of the Board's order. But the Board's order and the notice which it directed respondent to post had relation not merely to such a withdrawal but to the withholding of any other recognition of Morgan Union "unless and until said labor organization shall have been certified by the National Labor Relations Board as the exclusive representation of such employees".

Enforcement decreed.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

DECISION AND ORDER

On January 22, 1969, Trial Examiner George H. O'Brien issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Party in interest filed exceptions to the Decision and supporting briefs, and the General Counsel and one of the Charging Parties, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, filed cross-exceptions to the Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modification.[1]

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[1] In ordering that Respondent reimburse employees for monies withheld pursuant to checkoff authorizations, we find it unnecessary to consider the Trial Examiner's additional reason that the Respondent is prohibited by Section 302 from honoring checkoff authorizations which are by their terms irrevocable, absent a valid collective-bargaining agreement.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, American Beef Packers, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

Delete the words "or to permit" from section 1(c) of the Trial Examiner's Recommended Order.[2]

Dated, Washington, D.C. [Stamped June 3, 1969]

John H. Fanning, Member
Gerald A. Brown, Member
Sam Zagoria, Member
(SEAL) National Labor Relations Board.

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[2] The words "or permit" also appear in the second paragraph of the Remedy section of the Trial Examiner's Decision, and are unnecessary, as we find no reason in this case to depart from our customary language.

APPENDIX C

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

GEORGE H. O'BRIEN, Trial Examiner: On October 29, 1968, a hearing was held in the above entitled matter in the Morgan County Courthouse, Fort Morgan, Colordao, at which all parties appeared and participated. The consolidated complaint issued by the Regional Director, Region 27 of the National Labor Relations Board no August 14, 1968,[1] is based upon a charge filed by Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 641, AFL-CIO on July 9, 1968, and upon a charge filed by International Union of Operating Engineers, Local No. 1, AFL-CIO on July 10, 1968, alleges violation of Section 8(a) (1) and (2) of the National Labor Relations Act, as amended.

The gravamen of the complaint is that Respondent accorded exclusive recognition to and entered into a collective bargaining agreement with A. L. Morgan Union Local No. 3 at a time when A. L. Morgan Union Local No. 3 did not represent an uncoerced majority of Respondent's employees in an appropriate unit.

Upon the entire record in this case, including my observation of the witnesses while testifying under oath, and after due consideration of the briefs[2] filed

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[1] All dates at 1968.

[2] I am precluded by Section 102.42 of the Board's rules from giving consideration to the brief tardily filed by counsel for Amalgamated. On October 29 I announced on the record that briefs were due in San Francisco on Monday, December 2. On Wednesday, November 27, the Associate Chief Trial Examiner received Mr. King's telegraphic request for a 1 week extension and issued a telegraphic order extending time for filing briefs to Monday, December 9. Following a telegraphic protest by Mr. Tate, the Associate Chief Trial Examiner, on December 4, ordered:

Inasmuch as it appears from Respondents telegram of December

by counsel for the General Counsel, and counsel for the Respondent, I make the following:

FINDINGS OF FACT

I. The Business of the Respondent

American Beef Packers, Inc., herein called Respondent, is an Iowa corporation engaged in the business of the slaughter, processing, and sale of meat and meat products. It maintains its principal office and place of business at Oakland, Iowa and also operates plants in Omaha, Nebraska and Fort Morgan, Colorado. (This proceeding concerns only the Fort Morgan plant.) Its annual direct out-of-state shipments and its annual direct purchases from out of State each exceeds $100,000 in value. Respondent is now, and at all times material herein has been, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 641, AFL-CIO, herein called Amalgamated; International Union of Operating Engineers, Local No. 1, AFL-CIO, herein called Engineers; and A. L. Morgan Union, Local No. 3, herein called Morgan Union, are labor organizations within the meaning of Section 2(5) of the Act.

4, that Respondent was not served with your request for an extension of time for filing briefs in the subject case, in fairness to all parties I have reviewed the entire matter and with particular reference to Section 102.114 the Board's Rules and Regulations, find that your request dated November 27 as untimely filed due to the intervening Thursday, a holiday, Saturday and Sunday. Regretfully because of my initial oversight and any inconvenience thereby caused the parties, I must therefore rescind my Order granting your request for an extension.

III. The Alleged Unfair Labor Practices

A. *The Issue*

The principle and controlling issue in this case is one of fact. The date and time when Respondent Recognized the Morgan Union and the fact that a majority of employees in an appropriate unit had signed check-off authorizations in favor of Arthur L. Morgan *before* recognition was accorded are firmly established. The prime question to be decided is whether Respondent, by directing an employee, Donald Kroshus, to obtain employee signatures on check-off cards destroyed its right to rely on such cards as evidence that the Morgan Union represented an uncoerced majority of its employees. The factual issue in its simplest form is:

> On what date did employee Larry Johnson hand blank check-off cards to Donald Kroshus and request Kroshus to obtain signatures, and did this transaction take place in the office of and in the presence of the plant superintendent, John Stefanich?

B. *Uncontroverted Facts*

Respondent began operations, *i.e.* had its first "kill" at the Fort Morgan plant on Monday, June 10. For some time prior thereto it had been hiring employees, and some had been doing preparatory work in the plant since at least May 16. John Stefanich, who had been employed in a supervisory capacity by Respondent in Oakland was appointed superintendent and assumed his new title and responsibilities on Monday, May 27.

Arthur L. Morgan founded the Morgan Union in 1955 and holds the office of president. The Morgan Union represents employees in 14 plants in four states, including all three of Respondent's plants. Shortly before June 10 Morgan told Thomas Sparks, Respondent's general manager in charge of labor relations at

all plants, that he intended to organize the employees at Respondent's new plant in Fort Morgan. Sparks replied that the plant while under previous ownership had operated nonunion, and that Respondent expected to operate it the same way. Sparks told Stefanich about Morgan's announcement, and asked Stefanich to keep him posted on any kind of union activity around the plant. At a casual encounter in a Fort Morgan restaurant on Sunday, June 9, Morgan told Stefanich he was in town to organize the plant.

Morgan entered the plant on Monday morning, June 10, and told Stefanich, whom he had known in Oakland, that he wished to see an employee, Larry Johnson. Stefanich escorted Johnson to the parking lot, introduced him to Morgan and left. Johnson accepted Morgan's invitation to act as steward and received from Morgan check-off authorization forms which read:

> not more than seventy-five days before the anniversary or expiration date of said contract.
>
> To:———————— Date————————
>
> I authorize and direct you to check off from my pay union dues and remit same to our labor organization reresentative, Arthur L. Morgan, and authorize said dues to be spent for wages, expenses, office and clerical, steward expense, rent of halls and other such expenses. Withdrawal of this otherwise irrevocable authorization and membership may be by notifying the company and union in writing not less than sixty days before the anniversary date of the contract or expiration date but
>
> Signed ————————————

Later the same day Stefanich asked Johnson whether he was steward of the Morgan Union and Johnson replied in the affirmative. By 9:00 a.m. on Wednesday, June 12, a majority of the 43 employees then working had signed cards in blank, and these cards had either been handed to Stefanich by Johnson, or left on the

desk of Stefanich's secretary, Charlotte J. Lapp. The name of Respondent and the date were written on the cards (after they were signed), by either Johnson, Sparks, Stefanich or Charlotte Lapp.

Between 8:00 a.m. and 9:00 a.m. on Wednesday, June 12 (starting time of production workers was 7:30 a.m.), Morgan called at the plant and presented to Sparks a typewritten list comprising at least 25 names, stated that all of these had signed check-off cards, that they constituted a majority, and demanded recognition. Sparks compared the names on Morgan's list with the cards[3] in his possession, ascertained that a majority of the production and maintenance employees had signed cards, and agreed to recognize the Morgan Union.

Sparks had in his valise, copies of Respondent's contracts with the Morgan Union covering operations in Oakland and in Omaha. Using these as a guide, additions and deletions were made and, after negotiating for about 1 hour Morgan and Sparks reached complete agreement. Morgan stated that his signing was contingent upon the agreement being approved by Johnson. After a clean copy of the Fort Morgan contract was typed, Johnson went over it with Sparks and affixed his signature. The contract, which bears the date June 12, 1968, does not make union membership a condition of employment.

On June 28 Morgan dispatched to Respondent the following letter:

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[3] Appendix A attached hereto is a list of all the cards identified by Sparks, showing the words and figures written on each.

Manager
American Beef
Ft. Morgan, Colorado

Re: Union Contract Violations

Dear Sir:

We fully understand that with a brand new operation starting out as fast as your doing, you will make mistakes. We understand this. We do not understand your apparent disregard of our contract terms and conditions. See that the total terms are complied with or we shall seek our remedy in the courts under Section 301 of the Act.

Sincerely
Arthur L. Morgan

On July 10, 1968, Charlotte J. Lapp acknowledged receipt of two registered envelopes. Both were from the Denver office of the National Labor Relations Board. Each contained a copy of the charge filed by Amalgamated. One was addressed to Respondent and one was addressed to the Morgan Union.

On the evening of July 10, at the Farmers Union Hall in Ft. Morgan, the Morgan Union had its first meeting. There were 37 members in attendance. (Membership in the Morgan Union is achieved by signing a check-off card.)

Prior to the meeting Kroshus had written out in long-hand and given to Morgan a statement reading:

I wanted Arthur L. Morgans Union. I signed up everyone accept the ones Larry Johnson signed up the company didn't talk to anyone about the union.

We gave the cards to the company and demanded they recognize the Union.

July 10, 1968 DONALD KROSHUS

On July 11, Morgan met with Stefanich and Mr. Garness, another of Respondent's officials, and presented 30 grievances, based on complaints made by members at the meeting the night before.

As of June 12, there were 43 employees in the contract unit. As of the date of the hearing, October 29, there were 85 to 90 employees in the unit. Between June 10, and October 29 a total of at least 70 signed cards had been received by Respondent. Some of these cards had been solicited by Kroshus.

C. *Testimony Tending to Establish the Date on Which and the Circumstances Under Which Kroshus Received Check-off Cards in Blank from Johnson*

(1) The testimony of Larry Johnson

Larry Johnson, who had worked at the plant while it was under prior ownership was hired by Respondent on May 16, 1968, at $2.00 per hour. Leland Drake, who hired Johnson, stated that the new rates would be established after a manager was transferred to Fort Morgan. On the morning of June 10 or June 11

> John Stefanich come back to the rendering room where I was working and said there was a man out in the car that would like to meet me, and we walked out to the parking lot there, and he introduced me to Arthur Morgan, and then John left
>
> . . . .
>
> It was in the morning time. I'd say between nine and ten o'clock that I remember. And he said he was a union man and asked me what I thought about the union. And he explained the union to me and asked me if I wouldn't like to be a stewardess for him, and I said I would and he gave me some grievance forms and some cards to assign to each man and told me how to go about signing the men up, and how to use the grievance forms, and

> just generally explain the union to me, and that was about the size of it
>
> . . . .
>
> Well, we didn't have nothing at the time. There wasn't no union in there, and he explained the hospital plan that we would have which I thought was real good, and the benefits that this contract would have. I thought they were real good.

Johnson spent from half an hour to forty minutes of working time talking to Morgan. During this and the succeeeding two days Johnson obtained six signatures on check-off cards. Between the time of his meeting with Morgan and the date of the hearing (October 29) he obtained from 25 to 30 signatures. There were about 43 plant workers on June 12, and 85 to 90 on October 29.

In soliciting signatures, Johnson told employees that the Union would deduct $4.00 per month from their salary for union dues, that it was Arthur L. Morgan's Union, that they belonged to the Union, once they signed the card. Johnson told employees that they should only sign their names and should not fill in either the date or the name of Respondent. He told each employee to whom he spoke that the employee could either sign the card or tear it up, that if he signed the card he should either return it to Johnson or give it to John Stefanich. Acting on instructions from Stefanich every card which was returned to Johnson was handed by him to Stefanich in person.

A few days after his meeting with Morgan, Stefanich asked Johnson how the signing was coming. Johnson replied that he did not have too many. The reason was that he did not work on the kill floor with the men there. There followed a meeting in Stefanich's office as to which Johnson testified:

Q. (By Mr. McCabe) Where did the meeting with Mr. Stefanich take place?
A. In his office.

Q. What time of day?
A. I am pretty sure it was in the morning time, between nine and ten o'clock.

Q. Who else was present, if anyone?
A. I think Tom Sparks was present, but I wouldn't say definite if he was or wasn't, but I'm pretty sure he was.

Q. Tell us what took place at that meeting, who said what?
A. Yes. I know Tom Sparks was present. They asked me how I was doing with those cards, if I was getting anyone signed up, and I told them I had a few signed up, and I asked for some help at that time. I asked for Don Kroshus' assistance.

Q. You asked who for help?
A. Either John or Tom. I was probably talking to both of them when I said it. I asked for some help, somebody to work with me on the kill floor, if I couldn't have one of them for assistance to get the cards signed up.

* * *

A. I am pretty sure John Stefanich went down and got him . . . .

Q. Tell us what conversation you had after Mr. Kroshus came into the office.
A. Well, we talked about the union, and then I told Don that I needed some help in signing these cards, and how to, more or less, go about it, and try to explain the union to these guys that they wanted to sign these cards and that they would be deducted this amount from their pay and I gave them some cards.

* * *

Q. (By Mr. Tate) (After Johnson has testified that the meeting could have been ten days to two weeks after June 10) . . . can you tell me

whether or not Mr. Sparks or Mr. Stefanich discussed the cards at all with Mr. Kroshus, or did you do that?

A. Well that's kind of confusing because I think we all discussed it with him. I know I did personally. I just don't remember if they did or didn't but that's what I wanted him up there for and—

Q. Did you give him some grievance forms to fill out for grievances on the kill floor?

A. I am pretty definite I gave them to them after the meeting was over when we went into the locker room but I won't say if I did or didn't.

Q. You gave them to him but you are not sure of exactly when?

A. Right. But I know I give them cards but the grievance forms I am not definite on that whether I give them or not. I might have told him that if he needed them to come to see me but if I gave them I don't remember.

* * *

Q. (By Mr. McCabe) I believe that your original testimony was that your meeting with Mr. Stefanich was about five days after he introduced you to Mr. Morgan, is that right?

A. Yes.

Q. And then on cross-examination you said it could have been ten days or two weeks?

A. I'll tell you what. You get me fouled up with two meetings. There was one meeting just after Mr. Morgan was introduced to me. That's when I asked about this other steward, and then there was another one when I signed the contract about ten days to two weeks later, and I am getting confused.

Q. Tell us when each of these two meetings occurred.

A. Well, this one after I met Morgan the first time was five days or seven days or three days, I don't really remember. That's when they asked me how I was doing with my work with

the union, and that's when I told them I wanted another steward, and then this other meeting came up about ten days to two weeks later when I signed the contract.

A week or 10 days after he first met Mr. Morgan, and *after* the meeting with Stefanish and Kroshus, a contract was presented to Johnson by Mr. Sparks. Johnson read the entire contract, told Sparks and Stefanich that there were two jobs ratings in the contract that he did not think were right and called their attention to a place where a.m. and p.m. were transposed through typographical error. The typographic error was corrected in pen and initialed by Sparks and Johnson then signed the contract. Sparks and Stefanich agreed that the pay inequities to which their attention had been called by Johnson would be corrected, but no change was made on the face of the contract. In answer to the question:

Q. (By Mr. McCabe) Do you know if anyone signed the contract before that?
A. Yes, almost definitely the men signed—I wouldn't say if it—if they had or hadn't, but I am pretty sure the other signatures were on there, but I don't know if they were or weren't.

Johnson was not asked whether he observed or noted any date anywhere on the contract which he signed. The contract which was received in evidence bore the signatures of Sparks, Morgan and Johnson and the date June 12, 1968 in bold ink. Johnson honestly conceded, "I sure don't remember dates."

(2) The testimony of Thomas F. Sparks

At some time between 8:00 a.m. and 9:00 a.m. on Wednesday, June 12, Morgan presented to Sparks a typewritten list of names of employees, stating that all

these had signed check-off cards and were members of A. L. Morgan Union. Sparks compared the names on this list with the signatures on check-off cards which had been filed and recorded by the office girl (Charlotte Lapp). There were at least 25 cards on file. Some of these cards had been left on her desk, some had been handed to her by Stefanich, by Sparks, or by Johnson. Sparks identified 30 cards as including all those which he had in his possession at the time of Morgan's call. The bulk of the cards had been dated by the girl in the office. As of June 12 there were 45 employees in the bargaining unit.

Upon ascertaining that Morgan represented a majority of Respondent's employees, Sparks agreed to recognize the Morgan Union. He and Morgan reviewed their Oakland and Omaha contracts and, after 1 hour of negotiations arrived at a complete agreement. Sparks caused a clean copy to be typed. Sparks testified:

> A. That afternoon after it had been typed I asked John [Stefanich] to bring Larry Johnson up to the office and Larry Johnson and myself and John sat down and I related what had happened that morning with Larry Johnson and told him that Arthur Morgan had agreed that if he reviewed the contract and if it was—if he was agreeable to the terms then Arthur Morgan would sign it after he did.
>
> Now, John wasn't there through the entire discussion. I don't remember exactly the incident but something did happen in the plant where he had to leave.
>
> * * *
>
> A. There were no changes that were made in the contract. There were typographical errors that Larry Johnson and myself both noted and initialed on the night premium, and the "A.M." and "P.M." were reversed.

The conference with Johnson lasted about 1 hour. Johnson signed the contract at the end of the conference on the afternoon of Wednesday, June 12, in the pressence of Sparks. Sparks signed immediately thereafter in the presence of Johnson. Sparks took the contract back to Oakland with him and on Saturday, June 15, Arthur L. Morgan signed the contract.

Sparks had only one meeting with Kroshus pertaining to the Morgan Union. This was *after* Morgan had met on July 11 with Stefanich and Garness concerning the Union's many grievances. It was in the hallway, in the general office just coming into the office.

Q. (By Mr. Dowd) Now, would you please relate to the best of your recollection what was said by you or John Stefanich or Larry Johnson or Don Kroshus at this meeting?

A. Well, Larry had requested through John and John approached me about it needing more help in resolving some of these problems as a result of this union meeting, the numerous grievances, and they would like to have Don Kroshus. So I told John to go ahead and proceed to get Don and bring him up, which I did.

Q. Don Kroshus was brought up at that time?

A. Yes.

Q. And when Don Kroshus arrived, what if any conversation took place that you recall?

A. Well, the bulk of the conversation was my concern over these grievances. I related that Larry Johnson had requested more help in resolving these things and getting the problems handled and I expressed my desire to agree to letting Johnson have Kroshus in order to resolve these problems because they were concerning to me.

Q. Was anything said during this meeting about obtaining a union check off card for the A. L. Morgan union?
A. Yes.

Q. What was the context in which that conversation took place?
A. Larry Johnson related he would also like to have him help him sign cards out.

Q. And what if anything did you say to this?
A. I told him if that's what he wanted it would be all right.

Q. Now, at any time during this meeting did John Stefanich made any statements to your recollection?
A. No, he didn't.

Q. Have you ever had possession of any blank union check off cards?
A. No.

Q. Did you observe whether Larrk Johnson gave Don Kroshus any union check-off cards at this meeting?
A. No, I didn't.

Q. Was this the only time that you did talk to Don Kroshus pertaining to the union?
A. Yes.

Q. Did you at any time approach Mr. Kroshus or any other employee relative to signing an A. L. Morgan Union check-off card?
A. No.

Q. Did you have any other occasions to meet with Larry Johnson pertaining to the union other than this occasion in the early part of July?
A. No, no.

Q. Is it your testimony then that you signed the union contract in the presence of Larry Johnson?
A. Yes.

Q. And other than that meeting and the meeting as you related in July, you had no further meetings with him?
A. No meetings as such. I was in and out of the plant in my travels and if we passed or my going through the plant I would ask them how things were going and that was about—there were no meetings.

(3) The testimony of Donald Keith Kroshus

Q. (By Mr. McCabe) What day did you start working there?
A. I think it was the 6th, if I recall right, a day or two one way or the other.

Q. Do you remember when the kill started then?
A. The 10th, 6th or 10th. I know we killed one or two head and then we started in.

Q. But you were working a few days before the kill started?
A. I think I worked a week before the kill started or four days or something like that.

Q. Did you sign a card for the A. L. Morgan Union?
A. Yes.

Q. How did you first learn about the union?
A. Larry Johnson got a hold of me—well, first, I think it was right after the kill that day John told me to come up to the office.

Q. John who?
A. Stefanich. I went up to the office and he introduced me to Sparks and, of course, I knew Larry and they started talking about the union—

Q. Mr. Kroshus, speak up.
A. And then they started talking about the union, and Larry give me those cards and asked me to get them signed. I got them signed and I either give them to John or laid them on the desk.

Q. What was said about the union?
A. Just said that it was the same union was in Oakland, Iowa, and they would like to have it out here.

Q. Who said they would like to have it here?
A. John Stefanich and Mr. Sparks.

Q. In Mr. Stefanich's office?
A. Yes.

Q. And who was present?
A. John and Sparks and Larry. I don't know if Garness was there or not, Bill Garness.

Q. I am not sure that I understood your testimony, so I ask you this question: When with relation to when the kill started did this kill take place? Was it on the first day of the kill or second or later or before or what?
A. It was not that day we killed. I think we killed one or six heads but it was the following day when we killed 50 or something. It was that first week when we opened up on the kill, when we were called up to the office. It was right after we got through killing. I think it was the day we killed that 50 head?

Q. Was it during working hours?
A. Yes.

Q. Did you hold any position with this union?
A. Not until they told me. They just said that I would work under Larry and help him with the stewards.

Q. Who said you would work under Larry?
A. John and Sparks.

* * *

Q. Who told you that you were an assistant steward?
A. Larry.

Q. Were you told by anyone else?
A. I don't know if John mentioned it or not. He might have, but all he told me was to help Larry with the union, if that's an answer, that he said I was a steward.

Q. Did you get the cards signed after that?
A. Yeah, Larry give me a bunch of them and I got them signed and I told those guys to either give them to me or lay them on John's desk when they got off work.

Q. Did you get any cards back signed?
A. Yes.

Q. Do you recall how many?
A. I don't know, probably 15, 20. I don't know.

Q. Now, during what period of time did you get 15 or 20?
A. Within the first ten days of when we started the kill.

Q. What did you tell the people about the cards when you gave them the cards?
A. All I told them was it was the same union they had in Oakland, Iowa, and they wanted to have it out here, if they could sign if they wanted to; they didn't have to.

Q. Did anybody else refuse to sign a card?
A. Albert Trujillo said he wouldn't sign it.

Q. Where were you when you gave Albert Trujillo the card?
A. Up in the locker room.

Q. Was anyone else present?
A. Yes, Felix Franco and I don't know how many guys were there.

* * *

Q. Did you tell anyone about the refusal of Albert Trujillo to sign a card?
A. John Stefanich asked me when I went down in the basement and I told him he didn't want to sign it and he told me to tell him to go home, and I said that was his job.

* * *

Q. Did you have any conversation with Mr. Stefanich about signing cards after this first meeting?
A. No. You mean—

Q. Did he ever pass you and ask about the card signing?
A. He asked me if I had any signed and I said I would give them—I didn't know if they would give them back to me or whether they turned them into the office or what they done with them.

* * *

Q. (By Mr. King) What did you do with the cards after they were returned to you?
A. I laid them on John Stefanich's desk.
Q. Now, do you recall at this time how many cards you had gotten signed, if any, by the 12th of June?
A. No, I don't recall how many I got signed within the first week. Altogether I probably got 15 or 20 of them signed, maybe more, maybe less.
Q. When you say altogether, you mean over the entire period that you were having cards signed?
A. Yes.
Q. And that extended for how long?
A. Probably a couple of weeks, after that I never got any signed. If I did, I didn't get them back. They laid them on John's desk.

Under cross-examination Kroshus freely admitted that he had quit his job because he was dissatisfied with the treatment he had received from Respondent and that he did not get along with his foreman, O'Del. Kroshus on July 10 wrote out the statement set forth in full, *supra*, and told Morgan that he had not intimidated any employee. He prepared this statement for Morgan because he thought the Union was "a good deal."

(4) The testimony of John Stefanich

In the morning of June 10, Morgan entered the door of the kill floor, encountered Stefanich and told him that

he wanted to see Larry Johnson. Stefanich replied that when Johnson went on his break or lunch period, Stefanich would bring him out to the parking lot. Stefanich went back to the rendering works where Johnson was working and told Johnson that Morgan wanted to see him in the parking lot, and that Johnson could go see him on his noon break. At noon Stefanich returned to the rendering works, escorted Johnson to the parking lot and introduced him to Morgan. When Stefanich next visited the rendering works about 1½ to 2 hours later, Johnson was on the job.

On June 10 some Morgan Union check-off cards were handed to Stefanich by Johnson and some were left on his desk. Stefanich did not have any conversation with Johnson when the cards were handed to him. The same was true of the next day, Tuesday, June 11. Some cards were undated, and Stefanich inserted the date that he received them. He kept the cards in the personnel desk and did not mention them to his secretary.

On neither Monday nor Tuesday did Stefanich have any conversation with Larry Johnson nor with any other employee concerning the Morgan Union.

On the afternoon of Wednesday, June 12, Stefanich went down to the rendering room, got Larry Johnson, brought him to the office where Sparks was waiting and the three of them went over the contract together. When they were about one-third of the way through, Stefanich was called away to take care of a breakdown, or some other thing. When he returned to the office Johnson had left. Stefanich looked at the signature page of the contract and noted that signatures of Johnson and Sparks and also noted that Morgan had not signed. To this moment Johnson had had no conversa-

tion with any employee pertaining to the Union or to union checkoff cards.

Stefanich knew that Johnson was the steward for the Morgan Union because, on the afternoon of Monday, June 10, Stefanich asked Johnson if he was the steward and Johnson replied that he was a steward.

A couple of times in July, at Johnson's work station Stefanich, inquired of Johnson how he was coming along with the union cards.

On July 11, Stefanich met with Morgan and Garness in Garness' office for at least 3 hours discussing around 30 grievances. Many were adjusted, resulting in back-pay for some employees and results were posted on the bulletin board.

Around the middle of July, Stefanich encountered Johnson in the hallway. Johnson said that being in the rendering works was kind of remote to the plant and he could use more help. He asked if he could have Don Kroshus as a kill floor steward. Johnson went down to the kill floor, asked Kroshus to follow him to the office where Sparks and Johnson were waiting. There followed a discussion of grievances. Union cards were not mentioned. Prior to this meeting with Sparks in the office Stefanich had never discussed grievances with Johnson. Johnson never had any discussion with Kroshus about union cards.

(5) Testimony of card signers

Jess Pierce was hired and started to work on June 10. In the locker room after he finished work for the day Don Kroshus handed him a card stating that he wanted Pierce to sign it and that if Pierce did not sign it he would probably be dismissed. Pierce signed and inserted the date in his own handwriting, 6-12-68. Vig-

orous cross-examination demonstrated that Pierce's recollection of the number of hours he worked on each of his first 3 days was unreliable.

William C. Baughman was hired and started work on June 10. While working in the offal room and during his own working time he signed a card in blank at Johnson's request.

Albert Trujillo was hired and started to work on June 10. The next day in the locker room with a number of other employees present Kroshus handed him a card. "We was talking about the union, Local No. 3, I guess, and we was talking about it. And we had words. And finally he told me that anybody that didn't sign it they would fire them. And I told him—I didn't think much of it." This was at the noon lunch break after the kill was completed about 1:00 p.m. Within the half hour, and while Trujillo was still eating lunch his foreman, O'Del, told him to clean up and go home, stating, "Anybody that didn't sign that card was fired." Trujillo then signed the card and handed it to O'Del and asked if he should come in the next morning. O'Del said Trujillo would have to ask Stefanich. On the date of the hearing Trujillo was still employed and had been elected steward of the Morgan Union at a meeting held in September. Vigorous cross-examination demonstrated that Trujillo, like Pierce could not remember accurately how many hours he worked on June 10 or 11.

The cross-examination also developed one very material fact. Respondent's time records show that Trujillo worked 9 hours on June 10, and only 5¼ hours on June 11.

Felix Franco was hired about May 18. At lunch time on June 12 in the presence of other employees Kroshus handed Franco a card stating that if Franco

did not sign the card he wasn't going to have a job too long. Franco took the card home with him and next day, the 13th, he signed the card, wrote in the date and put the card on the desk of Stefanich's secretary. He too, under cross-examination demonstrated that his recollection of dates was not reliable.

William O'Neilu, o foreman, signed a card at the request of Johnson.

D. Evaluation of Testimony

I credit the testimony of Sparks in full. On June 12, at 9:00 a.m., Sparks had in his possession 29 of the 30 cards which were received in evidence and none other. Sparks reviewed the contract with Johnson on the afternoon of June 1, and Johnson signed the contract in Spark's presence on June 12. Sparks had only one meeting with Kroshus concerning the Morgan Union. This meeting was after July 11.

In all respects other than dates (and the presence of Sparks at, and the time of the meeting with, Stefanich and Kroshus *before* the contract was signed), I credit the testimony of Johnson. Johnson was at the time of the hearing employed by Respondent, held the position of steward in the Morgan Union and was obviously loyal to both his employer and his union. He gave every impression of testifying honestly to the very best of his recollection. Based on demeanor alone I would not discredit a single word spoken by Johnson. I find, however, that he was mistaken as to the date and time of his conference with Kroshus in Stefanich's office, was mistaken as to the date on which he signed the contract and mistaken as to the presence of Sparks on the former occasion.

I place no reliance on the testimony of Stefanich. He appeared to be under tremendous emotional strain and

may not have been well. His too obvious attempts to give the "right" answers to his counsel's frequently leading questions resulted in glaring contradictions and inconsistencies, and his defensive attitude under cross-examination involved him in two impossible assertions. Further his testimony is contradicted in material matters by the testimony of Sparks, of Johnson and of Kroshus. Stefanich testified categorically that no cards had been solicited by Kroshus before June 12, and made the positive assertion that prior to June 12, Stefanich counted exactly 30 check-off cards which had been signed by employees. Stefanich's assertion that check-off cards were not mentioned at a meeting With Kroshus in July is directly contradicted by Sparks. Stefanich's testimony that he did not talk to any employee about the Morgan Union before June 12 is contradicted by his testimony that he asked Johnson about his stewardship and implausible in view of his testimony that cards were handed to him by Johnson on both June 10 and June 11. Stefanich's testimony that he did not speak to his secretary about the cards that were left on her desk is hardly to be reconciled with his testimony that the secretary prepared a typewritten list of the names on those cards and that Sparks handed this list to Morgan. Here too, Stefanich is contradicted by Sparks, who testified that he did not know where or how Morgan obtained the typewritten list of names.

I credit Kroshus in full as to the date, time and content of his conference with Johnson in the office of Stefanich. The substance and circumstances are confirmed by Johnson. Further confirmation is supplied by the date on Franco's card, 6-10 and Franco's testimony that he received the card from Kroshus, as well as by the date on Kroshus' own card, 6-10. Kroshus' testimony that he obtained a total of 15 to 20 signatures receives inferential confirmation from the fact

that 18 of the cards received in evidence bear clock numbers preceded by the character "1" and that at least five of the signers of such cards worked on the kill floor. Kroshus' testimony as to the Trujillo incident is fully corroborated by Trujillo, and inferentially by Franco (for whom English is difficult). The date of the Trujillo incident is firmly fixed by the date on Trujillo's card, 6-11, and receives further confirmation from Trujillo's time record, which shows that he was sent home early on June 11. I was favorably impressed by Kroshus' demeanor on the stand and am thoroughly convinced that he gave honest answers to every question. He was mistaken about the presence of Sparks in Stefanich's office on June 10, having confused this with the meeting of mid-July, as to which he was not questioned.

Trujillo's testimony that O'Del (admitted by Respondent's answer to be a supervisor) stated: "Anybody that didn't sign that card was fired" is uncontradicted and unimpeached. The date of the incident is established by Trujillo's check-off card and confirmed by his timecard. I credit Trujillo on this point and I also credit his testimony that Kroshus stated on the same date (June 11) "Anybody that didn't sign it, they would fire them." This is consistent with statements attributed to Kroshus by Franco and by Pierce, and is not specifically denied by Kroshus.

I credit the testimony of Pierce in full, including his testimony that he signed and dated his check-off card on the evening of June 12. Pierce's card was not in the possession of Mr. Sparks when he recognized the Morgan Union.

E. Concluding Findings

On Monday, June 10, 1968, at about 9:00 a.m., Stefanich took Johnson from his work, escorted him to the

parking lot and introduced him to Morgan. Stefanich knew that Morgan's purpose was to organize the Respondent's plant. Johnson was paid by Respondent for the 30 to 40 minutes that Morgan required to persuade Johnson to act as steward. At about noon, Stefanich inquired of Johnson whether he had accepted the position of steward, and how he was coming with signatures on check-off cards. Johnson replied that his remote work station made it difficult for him to obtain many signatures. Stefanich then took Kroshus from his work on the kill floor to the office where Johnson told Kroshus about the Morgan Union, gave him blank check-off cards and told him how to get them signed. Stefanich told Johnson that when the cards were signed they should be delivered personally to him, or left on his secretary's desk. Stefanich told Kroshus that this was the Union that Respondent had in Oakland, Iowa and they wanted it in Fort Morgan.

Kroshus returned to the locker room where the men were cleaning up and eating lunch after the kill, told employees that this was the Union Respondent had in Oakland, Iowa, that Respondent wanted it in Fort Morgan and that anybody who did not sign a card would not be working there very long.

On Monday evening, 11 cards were turned in to Stefanich, all signed by persons whose clock number was preceded by the characters "1-".

On Tuesday, June 11, in the locker room while employees were eating lunch Kroshus had a heated argument with Trujillo in the course of which Kroshus stated: "Anybody that didn't sign it they would fire them." Shortly thereafter Foreman O'Del told Trujillo: "Anybody that didn't sign that card was fired," whereupon Trujillo signed the check-off card, which he had received from Kroshus, and handed it to O'Del. Tuesday evening eight cards were turned in. One was the

card of Trujillo. One was turned in by Johnson, and six were turned in by persons unknown. Three of the six were signed by persons whose clock numbers were preceded by the characters "1-".

On Wednesday, June 12, before 9:00 a.m. six cards were turned in by Johnson and four cards were turned in by persons unknown. Two of the four were signed by persons whose clock numbers were preceded by the characters "1-".

On Monday morning, June 12, when he recognized the A. L. Morgan Union, Sparks placed his sole and entire reliance on the 29 cards herein described. These cards, because of the statements and conduct of Stefanich and Kroshus are not reliable indicia of the desire of the respective signers to be represented by Morgan Union. I find that Morgan Union did not represent an uncoerced majority of Respondent's employees at the time recognition was accorded by Respondent or at the time the contract was signed on June 12 and June 15. As held by the Supreme Court in *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72, 80.

> We are dealing here not with private rights nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible. Thus, where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.

Morgan Union was unlawfully accorded recognition by Respondent on June 12. It is immaterial that Morgan and Sparks may have believed in good faith that the Union did represent an uncoerced majority. The following words of the Supreme Court in *International Ladies Garment Workers* v. *N.L.R.B.*, 366 U.S. 731, 738 are particularly apt:

> To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives. We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved. The act made unlawful by § 8 (a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, as set forth above, occurring in connection with the operations of Respondent described above have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As the collective-bargaining agreement of June 12, 1968 has been found to have been entered into and subsequently maintained under the conditions described above, and at a time when Morgan Union did not represent the free choice of a majority of the employees in the unit described in the agreement, it will be recommended that Respondent be required to set aside said agreement and cease giving effect to it or any supplement, extension or renewal thereof. The setting aside of said agreement shall not require or permit Respondent to vary or abandon any existing term or condition of employment. It will also be recommended that Respondent be required to withdraw and withhold all recognition from Morgan Union unless and until said labor organization shall have been certified by the Board as the collective-bargaining representative of Respondent's employees in an appropriate unit.

In view of the foregoing, and for the additional reason that Respondent is prohibited by Section 302 of the Act from honoring check-off authorizations which are by their terms (in the absence of a valid collective-bargaining agreement) irrevocable, it will be recommended that Respondent be required to reimburse all present and former employees for union dues withheld from their wages and remitted to Arthur L. Morgan. In accordance with the Board's decision in *Isis Plumbing and Heating Co.*, 138 NLRB 716 and *Quality Coal Corporation, et al.*, 139 NLRB 492 interest should be included on such dues reimbursement, such interest to be computed in the manner set forth in *Seafarers International Union*, 138 NLRB 1142.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce

and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated, Engineers, and Morgan Union are labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing Morgan Union at a time when it did not represent a valid uncoerced majority of its employees as the exclusive collective-bargaining representative of its employees, Respondent violated Section 8(a)(2) and (1) of the Act.

4. By entering into a collective-bargaining agreement containing dues checkoff provisions with Morgan Union at a time when Morgan Union did not represent a valid uncoerced majority of its employees, and by giving effect to said agreement, Respondent violated Section 8(a)(2) and (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that Respondent, American Beef Packers, Inc., its agents, successors and assigns, shall:

1. Cease and desist from:

(a) Giving unlawful assistance or support to A. L. Morgan Union, Local No. 3, or to any other labor organization, by recognizing or entering into a contract with it as an exclusive bargaining agent at a time when it does not represent a validly designated majority of Respondent's employees in an appropriate unit.

(b) Recognizing A. L. Morgan Union, Local No. 3, or any successor thereto, as the representative of any of its employees for the purpose of collective bargaining, unless and until said labor organization shall have been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees.

(c) Giving effect to, performing, or in any way enforcing its contract dated June 12, 1968, or any modifications, extensions, or renewals thereof, or any other contract, agreement, arrangement, or understanding entered into with A. L. Morgan Union, Local No. 3, or any successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said labor organization shall have been certified by the National Labor Relations Board as the exclusive representative of Respondent's employees; provided, however, that nothing in this Decision shall be construed to require or to permit Respondent to vary or abandon any wages, hours, seniority, or other substantive feature of its relations with its employees which Respondent has established in the performance of said contract, or to prejudice the assertion by employees of any rights they may have thereunder.

(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Reimburse each of its former and present employees for all wages withheld under authorization to check off and remit union dues to Arthur P. Morgan, together with interest at the rate of 6 percent per annum from the date of each withholding.

(b) Withdraw and withhold all recognition from A. L. Morgan Union, Local No. 3, or any successor labor organization, as the representative of Respondent's employees for the purposes of collective bargaining, unless and until said labor organization shall have been certified by the National Labor Relations Board as the exclusive representative of such employees.

(c) Post at its plant in Fort Morgan, Colorado, copies of the attached notice marked "Appendix B."[4] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by an authorized representative of Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the said notices are not altered, defaced or covered by any other material.

(d) Notify the said Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[5]

Dated: January 22, 1969

/s/ George H. O'Brien
Trial Examiner

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[4] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[5] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 27, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

TXD APPENDIX A

Ex #	Name	Clock #	Name of Company Inserted by	Date	Date Inserted By
4-A	Larry Smethy		Johnson	June 12 1968	Johnson
4-B	John Franco	1-9		6-10	
4-C	Victor Franco	1-10		6-11-68	
4-D	Andres Rios Jr.	9-4502		6-11-68	
4-E	Albert Trujillo	1-22		6-11-68	
4-F	Jose M. Jiminez	9-4501		6-11-68	
4-G	Larry L. Jamison	1-15		6-11-68	
4-H	Roger E. Johnson	6-3003	Johnson	June 11 1968	Johnson
4-I	Joe Martinez	1-17		6-11	
4-J	Ben Oberbarg			6-11	
4-K	E. G. Kunke	1-14		6-10	
4-L	Don Kroshus	1-14		6-10	
4-M	Alex Luna Jr.			6-10	
4-N	Manuel Garcia	1-31		6-10	
4-O	Ramiro Mares	1-21		6-10	
4-P	Alex Luna	1-40	nameline blank	6-10	
4-Q	Donald E. Taylor	1-18		6-10	
4-R	Gary Harrison	1-20		6-10	
4-S	Alfred Huadecky	1-23		6-10	
4-T	Felix Franco	1-7		6-10	
4-U	Jess Pierce	1-29		6/12/68	Pierce
4-V	Roger Dale Sheppard	2-1005		6/12/	
4-W	Clifford Barnts	4-4005		6/12/68	
4-X	Richard M. Soto	1-28	Johnson	June 12 1968	Johnson
4-Y	Larry B. Johnson	6-3002	Johnson	June 12 1968	Johnson
4-Z	William C. Baughman	2-1004	Johnson	June 12 1968	Johnson
4-AA	Chauncey V. Anderson	4-2014	Johnson	June 12 1968	Johnson
4-BB	Dale L. Nichols	1-12		6-12	
4-CC	Floyd Nichols	1-27		6-12	
4-DD	Mickey Dion		Johnson	June 12 1968	Johnson

TXD APPENDIX B

TXD-(SF)-5-69

NOTICE to ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL
EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT give unlawful assistance or support to A. L. Morgan Union, Local No. 3, or any other labor organization, by recognizing or entering into a contract with it as exclusive bargaining agent at a time when it does not represent a validly designated majority of the employees in an appropriate unit.

WE WILL NOT enforce or give effect to our collective bargaining agreement with A. L. Morgan Union, Local No. 3 dated June 12, 1968, or to any extension, renewal, modification or supplement thereof, or to any superseding agreement, or give effect to any dues check-off authorizations heretofore executed by our employers in favor of Arthur P. Morgan.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from A. L. Morgan Union, Local No. 3 as the collective-bargaining representative of our employees and WE WILL NOT deal with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or

other terms and conditions of employment, unless and until such labor organization has been certified by the Board, following a Board-conducted election, as the exclusive bargaining agent of our employees in an appropriate unit.

WE WILL reimburse all present and former employees by paying to them all wages withheld under authorizations to pay union dues to Arthur P. Morgan, together with interest at 6 percent per annum from the date of each withholding.

All our employees are free to become, remain, or to refrain from becoming or remaining members of A. L. Morgan Union, Local No. 3, or any other labor organization.

AMERICAN BEEF PACKERS, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

- - - - - - - - - - - - -

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 260 New Custom House, 721—19th Street, Denver, Colorado, 80202, Telephone No. 297-3551.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1668

AMERICAN BEEF PACKERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 16-19) is reported at 438 F. 2d 331. The Board's decision and order (Pet. 20-55) are reported at 176 NLRB No. 42.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1971. The petition for a writ of cer-

tiorari was filed on May 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company lent support to the union's effort to coerce membership therein and subsequently recognized the union and entered into a collective bargaining agreement with it, at a time when the union did not represent a voluntary majority of the company's employees.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act (61 Stat. 136, as amended, 73 Stat. 519, 29 U.S.C. 158) is set forth at page 2 of the petition.

STATEMENT

A. The Board's Findings of Fact

The Company, a meat packer with plants in Oakland, Iowa, and Omaha, Nebraska (Pet. 23), began slaughtering operations at its Fort Morgan, Colorado, plant on June 10, 1968.

On that date, Arthur L. Morgan, the president of Morgan Union,[1] told plant superintendent John Stefanich that he wished to see employee Larry Johnson (Pet. 25; A. 129).[2] Stefanich escorted Johnson from

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[1] Morgan Union represented the employees at the Company's other plants (Pet. 24).

[2] "A." references are to the appendix to the briefs in the court below which is on file with the Clerk.

his work station to the plant parking lot, introduced him to Morgan, and left (Pet. 25; A. 38). At Morgan's request, Johnson accepted the position of steward for the union, and Morgan gave him check-off authorization cards to be signed by the employees (Pet. 25; A. 39). Johnson told each employee that he could either sign the card or not and, if he signed, he should return the card either to Johnson or Stefanich (Pet. 29; A. 54).[3]

Later that same day, June 10, Johnson told Stefanich that the card signing was coming along slowly because he did not work on the "kill floor" where most of the employees performed their duties. Johnson asked for help to get the cards signed; Stefanich agreed that Don Kroshus, who worked on the "kill floor," should be enlisted to help (Pet. 46; A. 42, 44-45, 48, 60). According to Johnson, Stefanich thereupon brought Kroshus back to his office (Pet. 46; A. 44-45, 63). Johnson told Kroshus about the Morgan Union, gave him blank check-off cards, and told him how to get them signed. Kroshus testified that at this meeting Stefanich told him that Morgan Union represented the Company's employees in Oakland, Iowa and that the Company wanted it to represent the employees in Fort Morgan (Pet. 46; A. 63).

Following this meeting, Kroshus returned to the locker room where the "kill floor" men were cleaning up and eating lunch. He told them that Morgan Union was the union that represented the Company's

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[3] Acting on instructions from Stefanich, Johnson delivered every card he received to Stefanich (Pet. 29; A. 41).

employees in Oakland; that the Company wanted it to represent the Fort Morgan employees; and that anyone who did not sign a card would not be working there very long. (Pet. 46; A. 99.) After work that day, Kroshus handed employee Jess Pierce a card, stating that if Pierce did not sign it he "would probably be dismissed" (Pet. 41-42; A. 87). The next day, June 11, Kroshus had a heated argument with employee Trujillo. Kroshus stated: "Anybody that didn't sign it [the check-off card] they [the company] would fire them." Shortly thereafter, Foreman O'Del told Trujillo: "Anybody that didn't sign that card was fired." Trujillo then signed the check-off card and handed it to O'Del. (Pet. 42, 45, 46; A. 99-101.) On June 12, during lunchtime and in the presence of other employees, Kroshus handed employee Franco a card, stating that, if Franco did not sign it, he "wasn't going to have [a] job too long." Franco signed the card the following day and put it on the desk of Stefanich's secretary (Pet. 42-43, 44-45; A. 109).

In the meantime, on June 12, Arthur Morgan had given Tom Sparks, the Company's manager of operations, a list of the employees who he claimed had signed check-off cards; on this basis he demanded recognition of the union (Pet. 26; A. 15-16). Sparks compared the list with the cards on file in his office and accorded recognition to Morgan Union (Pet. 26; A. 20). Using copies of contracts that the Company had entered into with the Union at its other plants as a guide, and after negotiating for about one hour, Morgan and Sparks reached agreement. Morgan

stated, however, that he would sign the agreement only if it were approved by Johnson. Subsequently, a contract dated June 12, 1968, covering the Fort Morgan employees, was signed by Sparks and Johnson. Arthur Morgan signed the contract on June 15, at Oakland, Iowa (Pet. 26; A. 23-24, 30-32).

Early in July, the Amalgamated Meat Cutters Union and the International Union of Operating Engineers filed separate petitions with the Board for representation elections at the Fort Morgan plant. Those unions also filed charges which led to the instant proceeding. (Pet. 22.)

B. The Decisions Below

The Board found that the Company violated Section 8(a)(2) and (1) of the Act by recognizing Morgan Union, and by entering into a collective-bargaining agreement containing a dues check-off provision, at a time when the union did not represent an uncoerced majority of the Company's employees (Pet. 20, 50). The Board ordered the Company to cease and desist from recognizing Morgan Union as the representative of any of its employees and from giving effect to the June 12 contract, unless and until that union shall have been certified by the Board (Pet. 51). The Board also ordered the Company to reimburse all present and former employees for union dues (with 6 per cent interest) withheld from their wages and remitted to Arthur L. Morgan (Pet. 50-52). The court of appeals, in a *per curiam* decision, upheld the Board's decision and enforced its order (Pet. 16-19).

ARGUMENT

The ruling below was correct and there is no occasion for further review.

1. Petitioner seeks to take this case outside the "substantial evidence" rule of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 477, by contending (Pet. 7-12) that the Trial Examiner's ultimate factual conclusions were not compatible with the testimony of the witnesses he deemed worthy of belief. This claim is unfounded and is answered in the Examiner's lengthy opinion (see Pet. 22-49) which the Board affirmed (Pet. 20). It is enough to note here that the Examiner's opinion reflects substantial basis for crediting the testimony of Kroshus that his meeting with Johnson and Stefanich occurred on June 10—prior to the time the Company granted recognition to Morgan Union rather than afterward—and that this conclusion is not at variance with the Examiner's other factual findings. As the Examiner pointed out, Kroshus' version of the date of the meeting was corroborated by the dates on the authorization cards that he solicited (Pet. 44); moreover, Kroshus' testimony concerning the Company's affirmative attitude toward Morgan Union was corroborated by the testimony of other witnesses (Pet. 41-43, 45).

2. Petitioner's additional argument (Pet. 12-14)—that the Examiner erred in refusing to allow testimony as to Stefanich's treatment of Morgan Union stewards when he was a supervisor at the Oakland plant—is insubstantial. The Examiner did admit

testimony concerning Stefanich's "poor relations" with Arthur Morgan at the Oakland plant and Stefanich was permitted to testify that he had told employees at that plant not to join Morgan Union (A. 144). In this factual setting, the Trial Examiner acted well within his discretion in excluding further examination of Stefanich as to his alleged harassment of stewards at the Oakland plant as "going entirely too far * * *" (A. 144). The point had been made and further questioning along this line could have had little additional bearing as to whether Stefanich, or, more significantly, the Company in fact favored the organizational efforts of the union at the Morgan plant. See *National Labor Relations Board* v. *Remington-Rand*, 94 F. 2d 862, 873 (C.A. 2), certiorari denied, 304 U.S. 576.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

MAY 1971.

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